PP

v.

TUKIMAN DEMIN

HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CRIMINAL TRIAL NO: MT (3) 45-69-2002]
12 MAY 2008

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether established - Whether prosecution presented evidence affirmatively linking accused with drugs - Whether there was reasonable inference of possession - Whether there was additional incriminating circumstances implicating accused - Whether prosecution's case barren of demonstrating nexus between accused and offending drugs - Whether accused discharged without having to enter defence*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 39B(1) and (2) - Trafficking in cannabis - Allegation of - Possession of drugs - Whether proved - Whether mere presence of controlled substance in room of accused insufficient to sustain conviction - Whether mere knowledge by itself does not amount to possession - Whether accused occupier of the room within meaning of s. 37(b) - Whether prosecution's case barren of demonstrating nexus between accused and offending drugs*

EVIDENCE: *Statement - Evidence Act 1950, s. 32(1)(i) and (j) - Whether admissible - Whether witness giving statement an uninterested witness - Failure to call witness to give evidence in court - Whether created a gap in the prosecution's case*

The accused was charged for trafficking in 576.22 grams cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same Act. At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence. The prosecution filed an appeal against the whole of the said decision. The salient facts adduced by the prosecution were that on 24 October 2001, at about 9.30am SP5 had received information about drug trafficking activities at a house in Kg. Baru Plentong Tengah Masai Johor and had led a party of police personnel to the scene of the crime at 11am. SP5 had entered the house and found three Malay men and had then identified himself as a police officer. During a search in one of the bedrooms, SP5

recovered a plastic packet containing substances suspected to be cannabis on the top of the television's table and a slab of dried leaves suspected to be cannabis on the floor. The accused and his two friends, together with the items recovered, were brought to the police station and handed over to the investigation officer, SP9. These substances were later positively confirmed by the chemist to contain 576.22 gram cannabis. The two men that were arrested with the accused had been released on the instruction of the deputy public prosecutor. They later testified for the prosecutor. Based on the evidence adduced, there were three issues to be determined namely (a) whether the accused had exclusive possession over the drugs; (b) whether the prosecution could invoke the presumption under s. 37(b) of the Dangerous Drugs Act 1952 and (c) whether the statement made by one Samiun Mohd Dah under s. 112 of the Criminal Procedure Code was admissible in evidence by reason of s. 32(1)(i) and (j) of the Evidence Act 1950.

Held (acquitting and discharging the accused):

(1) The prosecution did not present one scintilla of evidence affirmatively linking the accused with the drugs other than the presence of the drugs in his room. Where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstances shown, must, as in all other criminal cases, exclude every other reasonable hypothesis other than that of guilt. The mere presence of controlled substance in the room of the accused, without more, would be insufficient to sustain a conviction when possession of the premise was non-exclusive. Simply finding drugs in a portion of the room accessible equally to other occupants and visitors, without more, would be insufficient to sustain conviction. (para 21)

(2) The accused was not alone when he was arrested. SP7 and SP10 were there too and both of them had spent the night at that house on the night of the raid. Samiun Mohd Dah, the occupier of the second room, was also in the house. It was evident that the door of the room could not be locked and anybody in the house had access to the said room. Mere knowledge by itself does not amount to possession. To prove possession, the knowledge of the presence of the drug and the custody/control over the substance must be proved by

evidence of equivalent facts. In this regard, the prosecution cited very few facts to enable the court to push mere speculation and to give rise to a reasonable inference of possession. (para 21)

(3) The drugs were not found on the accused but in the room to which several persons have equal access. The presence of SP7, SP10 and Samiun Mohd Dah and other bachelors in the house raised some doubts as to whether it could be said affirmatively that the drugs were in the possession of the accused or either one of them or all of them were in joint possession of the said drugs. Possession requires some nexus, link, or other connection between the accused and the offending drugs. There was no evidence of additional incriminating circumstances implicating the accused such as finger prints, incriminating statements, efforts to avoid arrest or the offending drugs were concealed in any portion of the room. The prosecution's case was barren of establishing, linking or demonstrating a nexus between the accused and the offending drugs. (para 21)

(4) The accused was not an occupier of the room within the meaning of s. 37(b) of the Act. To be an occupier of the room or premises, the accused must have exclusive occupation or exclusive use and care or management of the room or premises where the offending exhibit was found. The prosecution had tendered the accused's personal belongings to trigger the presumption that the accused was the occupier of the room. The prosecution had also called SP4, the owner of the house, to give evidence that the said house was rented out to the accused. However, there was nothing to show that other persons had no access to the said room. In fact, there was evidence that there were other people inside the house and visitors could enter and leave the said room freely. As such, the accused had no care and management of the room to trigger the presumption under s. 37(b) of the Act. (paras 22 & 24)

(5) A statement made under s. 32(1)(i) and (j) Evidence Act 1950 must be examined with the greatest caution especially in this present case where the accused was facing a charge carrying a mandatory sentence of death. The weight or probative value was very minimal because exh. 24 was not subject to cross

examination and this witness was not an uninterested witness because he was the occupier of the second room in the house where the drugs were found. Furthermore, certain amount of drugs were also found in his room and he was charged and convicted for an offence under s. 39A(2) of DDA 1952. Thus, the witness's statement did not inspire confidence. The failure on the part of the prosecution to call Samiun Mohd Dah to give evidence in court created a gap in the prosecution case. The prosecution had failed to prove a *prima facie* case against the accused. The accused was discharged without calling him to enter his defence. (paras 28, 30 & 31)

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Idris v. PP [1960] 1 LNS 40 HC ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Aris Yunus [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289 HC ***(refd)***
PP v. Basri Salihin [1993] 1 CLJ 420 HC ***(refd)***
PP v. Chan Peng Fatt [1999] 8 CLJ 414 HC ***(refd)***
PP v. Chong Wei Kian [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 HC ***(refd)***
PP v. Lai Ah Bee [1974] 1 LNS 119 HC ***(refd)***
PP v. Md Alim Samad [1998] 5 CLJ 590 HC ***(refd)***
PP v. Mohamed Kassim Yatim [1976] 1 LNS 105 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1994] 1 CLJ 200 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 1 LNS 8 HC ***(refd)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 HC ***(refd)***
PP v. Tan Ah Ling [1990] 2 CLJ 83; [1990] 2 CLJ (Rep) 839 HC ***(refd)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 112, 180(1)
Dangerous Drugs Act 1952, ss. 37(b), 39(A)(2), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 32(1)(i), (j), 114(g)

For the accused - Zahar Ngah; M/s Zahar & Partners
For the prosecution - Shahrizal Shaari DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Zawawi Salleh JC:

Background

[1] Tukiman bin Demin ('the accused'), was charged for trafficking in 576.22 grams cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same Act.

[2] The accused claimed trial to the charge.

[3] The prosecution called 11 witnesses to support its case. They are Sjn. Mohd Yatim bin Maarof, (SP1), L/Kpl Jagit Singh, (SP2), L/Kpl Mohammad Bassimi bin Sani, (SP3), Abul Hasan a/l Ghafoor Khan, (SP4), C/I Zambri bin Razab, (SP5), Saupy bin Daud, (SP6), Zamri bin Rahan, (SP7), D/Sjn Mohd Isa bin Jalil, (SP8), C/I Jafri bin Muhammad, (SP9), Azrul bin Ibrahim, (SP10), C/I Mohd Hadzir bin Che Pa, (SP11).

[4] At the end of the prosecution's case, the court had acquitted and discharged the accused without calling upon him to enter his defence.

[5] The prosecution now files an appeal against the whole of the said decision.

The Charge

[6] The charge in Bahasa Malaysia was in the following terms:

> Bahawa kamu pada 24 Oktober 2001, jam lebih kurang 11.00 pagi, di rumah No 21, Jalan Besar, Kampung Baru Plentong Tengah, Masai, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah berbahaya iaitu sejumlah 576.22 gram cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

A **The Prosecution's Case**

[7] The salient facts adduced by the prosecution can be summarized as follows:

B 7.1 On 24 October 2001, at about 9.30am, SP5 (C/I Zambri bin Razab) had received an information about drug trafficking activities at a house No. 21 Jalan Besar, Kg. Baru Plentong Tengah, Masai, Johor.

C 7.2 SP5 led a party of police personnel comprising of six members to the scene of crime and reached there at about 11am.

D 7.3 On reaching the house, the raiding teams were divided into two groups. SP5 together with the other three police personnel took up position at the front of the house. The second group, on the other hand, guarded the back of the house.

E 7.4 SP5 knocked on the front door of the house but nobody opened the door. From the windows, SP5 saw several men running towards the back of the house.

F 7.5 SP5 then entered the house by using the back door of the house which was slightly opened. Upon entering the house, he saw three Malay men and he identified himself as a police officer.

G 7.6 During a search in one of the bedrooms, SP5 recovered a plastic packet containing substances suspected to be cannabis on the top of the television's table. SP5 also recovered a slab of dried leaves suspected to be cannabis on the floor. Two bank account books (exh. P18 and exh. P19) belong to Tukiman bin Demin (the accused) were also recovered from the bedroom.

H 7.7 The accused and his two friends, together with the items recovered, were brought to the police station. Then, they were handed over to the Investigation Officer, SP9 (C/I Jafri bin Muhamad).

I 7.8 These substances were later positively confirmed by the chemist to contain 576.22 gram cannabis. (See Chemist Report in P17).

7.9 The two men that were arrested with the accused had been released on the instruction of the Deputy Public Prosecutor. Later, they testified on behalf of the prosecution (SP7 and SP10).

Burden On The Prosecution

[8] It is the duty of the prosecution at the close of its case to prove a *prima facie* case against the accused as provided under s. 180(1) of the Criminal Procedure Code. The steps that should be taken by the trial court at the close of the prosecution's case had been set out in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Balachandran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215. I had subjected the prosecution evidence to maximum evaluation and asked myself this question: "If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no *prima facie* had been made out and the accused would be entitled to an acquittal".

Evaluation Of Evidence By The Court

[9] Based on the evidence adduced, there are three issues to be determined, namely:

a) Whether the accused had exclusive possession over the drugs;

b) Whether the prosecution can invoke the presumption under s. 37(b) of the DDA 1952; and

c) Whether the statement made by Samiun bin Mohd Dah under s. 112 of the Criminal Procedure Code was admissible in evidence by reason of s. 32(1)(i) and (j) of the Evidence Act 1950.

[10] Each issue is considered in greater detail below.

Issue (a)

[11] Encik Zahar bin Ngah, the learned defence counsel, in his submission argued that the element of exclusive possession had not been proven by the prosecution. He invited the court's attention to the following facts:

A a) The accused's fingerprint was not found on the 2 (two) plastic packets containing substances suspected to be cannabis;

b) The room where the drugs were found cannot be locked;

B c) The accused was arrested together with his two friends (SP7 and SP10) who had spent the night at the house;

d) SP7 and SP10 gave evidence that they frequently came to that house. According to them, the accused's room will be the favourite spot because there is a television set in the room. C SP7 gave evidence that he slept in the accused's room on the night of the raid; and

e) Similar drugs (cannabis) were also found in the other room of the house. The occupier of the room, Samiun bin Mohd Dah, D was charged under s. 39(A) DDA 1952 and was convicted with the offence. However, he was not called to give evidence in court and this failure had deprived the defence to ask him questions relating to the offending drugs.

E **[12]** On the contrary, the learned Deputy Public Prosecutor, Encik Shahrizal bin Shaari, submitted that the prosecution had proved that the accused had the exclusive possession of the offending drugs based on the following facts:

F a) The drugs were not concealed in the room; it was 'in plain view' of the accused;

b) The accused admitted to SP5 that the room where the drugs were found was his;

G c) SP7 and SP10 gave evidences that the drugs did not belong to them; and

d) Several documents (exhs. P18, P19, P20, P21, P22 and P23) belong to the accused were found in the said room.

H **Exclusive Possession**

[13] The term "exclusive possession" is nowhere to be found in the Act. In understanding the concept of "exclusive possession"; I think it is appropriate to ascertain the meaning of "exclusive". I The court first looked at the dictionary definition of "exclusive". There are various definitions of "exclusive" according to dictionaries:

Webster's 1913 Dictionary

Having the power of preventing entrance; debarring from participation or enjoyment; possessed and enjoyed to the exclusion of others;

Merriam-Website On Line

1a: excluding or having power to exclude; b: limiting or limited to possession, control, or use by a single individual or group.

2a: excluding others from participation

Your Dictionary. Com

1. excluding or tending to exclude all others; shutting out other considerations, happenings, existence, etc: an exclusive interest in sport.
2. excluding all but what is specified "only" is an exclusive particle.
3. given or belonging to no other; not shared or divided, sole on exclusive right to sell something.

Dictionary.Com

1. "exclusivity" is defined as follow: not admitting of something else, incompatible: mutually exclusive plans of action.
2. omitting from consideration or account (often fol. by of): a profit of ten percent, exclusive of taxes.
3. limited to the object or objects designated: exclusive attention to business.
4. shutting out all others from a part of share: an exclusive right to film the novel.

[14] Thus, to sum up, the common usage, plain, natural and ordinary meaning of "exclusive" is "excluding or to exclude all others; not shared or divided". In the context of drug possession, "exclusive possession" can be construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive.

Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband. (See *Leow Nghee Lim v. Regina* [1955] 1 LNS 53). In the present case, the issue of joint possession does not arise.

[15] The concept of "exclusive possession" flows from judicial interpretation of the Act. A judicial decision construing the word of a statute does not constitute the creation of a new legal principle. The construction of a statute, rather, the exercise of determining the intent of the legislature when the Act was passed. The courts sought to find the intent of the legislature and to apply it to the facts of the case.

[16] There is a plethora of cases decided by the courts on this point. The principle as discernible from those cases is simply these: there is a burden of proof on the prosecution to exclude the possibility of access by others to the place where the drugs are found. A failure by the prosecution to establish this would result in an acquittal of the accused; for example:

(i) *PP v. Chan Peng Fatt* [1999] 8 CLJ 414. The court found that the accused did not have exclusivity to the attic where the drugs were found; therefore he was acquitted and discharged.

(ii) *PP v. Md Alim Samad* [1998] 5 CLJ 590. The rooms where the drugs were found were accessible by different people frequenting the house. The court held that knowledge alone was not enough to establish control.

(iii) *Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168, SC. There were access by third parties to the premises, thus exclusivity of use of the premises had not been proved and the accused was acquitted.

(iv) *Pang Chee Meng v. Public Prosecutor* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, SC. The accused was acquitted even though the drugs were found in his room, but, as he shared the room with several others, the prosecution had not proved exclusive use of the room or exclusive custody or control of the drugs.

(v) *Public Prosecutor v. Basri Salihin* [1993] 1 CLJ 420. The bin where the drugs were found was accessible to the general public and the accused had no exclusive control over it. Therefore, the accused was acquitted and discharged.

[17] In 3 (three) celebrated cases of *Abdullah Zawawi bin Yusof v. PP* [1993] 4 CLJ 1, *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43, SC and *Public Prosecutor v. Muhamad Nasir bin Shaharuddin & Anor* [1992] 1 LNS 8, the court emphasized that the exclusivity of custody and control of the drugs by the accused must be established by the prosecution. Therefore, for possession to be established, accessibility by others to the place where the drugs are found must be excluded.

[18] In the first case, the drugs were found in the appellant's tool box in a locked cupboard, the keys of which were with the appellant's wife, in the appellant's house which was still under construction. The appellant's wife was jointly charged but was acquitted at the end of the prosecution's case. Edgar Joseph Jr SCJ said:

> Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

He adds further:

> This question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed. The evidence indeed could have been regarded as implicating the appellant or the wife or both of them or the informer or even the other man living in the house.

[19] In the second case, the drugs were found in a room occupied by the accused and his wife as well as from the common kitchen of the same house which was accessible to all the occupants of the house. Only the accused was charged. The Supreme Court held that the prosecution had to establish beyond reasonable doubt that the appellant alone had possession of the drugs or that both he and his wife had joint possession of the drugs. Here, the prosecution had not shown that the accused had sole possession or joint possession of the drug, ie, a common

A intention to possess. Doubt existed as there were two people in the room and there was no evidence of common intention and further, there was access by others to the kitchen.

[20] In the third case, it was held that generally, if exclusive
B occupation of premises cannot be established, especially where other persons also had access to the premises, it cannot be said that the occupier had custody and control over everything found in the premises. Furthermore, where two or more persons were found in a place where an offence had been committed, and if the
C evidence did not clearly point to one or the other, the guilt of neither had been established.

[21] Now, reverting back to the present case, the court concluded that the prosecution had failed to prove that the
D accused had the exclusive possession of the offending drugs on the following reasons:

21.1 At the outset, it should be observed that the prosecution did not present one scintilla of evidence affirmatively linking the accused with the drugs other
E than the presence of the drugs in his room. Of course, a conviction for possession of dangerous drugs may be predicated on circumstantial evidence. It is settled law that the drugs need not be found on the person of the accused, as long as it is found in a place under his
F custody or control. However, where the prosecution relies on wholly circumstantial evidence to prove possession of dangerous drugs, the circumstances shown, must, as in all other criminal cases, exclude every other reasonable hypothesis other than that of guilt; and
G proof amounting only to strong suspicion or a mere probability of guilt is insufficient to sustain a conviction. (See *Idris v. Public Prosecutor* [1960] 1 LNS 40 and *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1). The mere presence of controlled substance in the accused's
H room, as in the present case, without more, would be insufficient to sustain a conviction when possession of the premise is non-exclusive. The accused's custody or control over the offending drugs which were found in his room may be inferred if there are additional circumstances
I tending to buttress such an inference. These additional circumstances include: (1) incriminating statements by

the accused; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) personal items owned by the accused mingle with the drugs, etc. Simply finding drugs in a portion of the room accessible equally to other occupants and visitors, without more, would be insufficient to sustain conviction. The evidence must show that the accused had exclusive access, use or possession of the room where the contraband is found.

21.2 Applying the considerations set out above, the evidence in this case was undisputed that the accused was not alone when he was arrested. SP7 and SP10 were there too and both of them had spent the night at that house on the night of the raid. Samiun bin Mohd Dah, the occupier of the second room, was also in the house. It was evident that the door of the room cannot be locked and anybody in the house had access to the said room. SP7 and SP10, in their evidence as the prosecution's witnesses, denied that the said drugs belonged to them. However, they did not say that the drugs belonged to the accused either.

21.3 It was submitted by the learned Deputy Public Prosecutor, the facts that the drugs were found in the accused's room; the drugs were in plain view of the accused and also the conduct of the accused in admitting that the room where the drugs were found was his, cumulatively showed that the accused had knowledge and custody/control of the offending drugs. With respect, this court disagrees. Mere knowledge by itself does not amount to possession. Even if the prosecution succeeds in establishing knowledge, they must also take a step further and establish control or custody of the drugs. (See *Public Prosecutor v. Muhamad Nasir bin Shaharuddin & Anor* [1992]1 LNS 8). To prove possession, the knowledge of the presence of the drug and the custody/control over the substance must be proved by evidence of equivalent effects. In this regard, the prosecution cited very few facts to enable the court to push mere speculation and to give rise to a reasonable inference of possession.

21.4 The drugs were not found on the accused but in the room to which several persons have equal access. The presence of SP7, SP10 and Samiun bin Mohd Dah and other bachelors ("budak-budak bujang") in the house, raise some doubts as to whether it could be said affirmatively that the drugs were in the possession of the accused or either one of them or all of them are in joint possession of the said drugs. Where possession is not clear, as in the present case, when the offending drugs may be attributed to more than one individual, possession requires some nexus, link, or other connection between the accused and the offending drugs. In this case, there is no evidence of additional incriminating circumstances implicating the accused such as finger prints, incriminating statements, efforts to avoid arrest or the offending drugs were concealed in any portion of the room. The bare-bones of the prosecution case is the contraband was found in the accused's room. Under the circumstances, the prosecution's case is barren of establishing linking or demonstrating a nexus between the accused and the offending drugs.

Issue (b)

[22] The accused is not an occupier of the room within the meaning of s. 37(b) of the Act. To be an occupier of the room or premises, the accused must have exclusive occupation or exclusive use and care or management of the room or premises where the offending exhibit is found (see *Lee Chee Meng v. Public Prosecutor* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168, SC; *PP v. Ong Cheng Heong* [1998] 4 CLJ 209; *Public Prosecutor v. Aris Yunus* [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289).

[23] It is admitted that it is not necessary for the occupier to be the owner of the premise. He may be a tenant or a mere licensee. The necessary requirement is that the occupier has or appears to have the care and management of such premise at the time of the commission of an offence. Mere presence of the accused in the premises or any part thereof does not amount to having care or management (see *Public Prosecutor v. Lai Ah Bee* [1974] 1 LNS 119). In *Public Prosecutor v. Tan Ah Ling* [1990] 2 CLJ 83; [1990] 2 CLJ (Rep) 839, the court held that although the electricity and telephone bills were in the name of the accused, they did not

afford sufficient grounds for the operation of the aforesaid presumption as there was no evidence adduced to indicate that it was not the wife or the accused "who had care and management of the house or control of the incriminating items so that either the one or the other could have been the occupier of the premises". In *Public Prosecutor v. Chong Wei Kian* [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690, the evidence was adduced that at the time of arrest, the accused had with him the keys to the room in which the drugs were found and in the said room the police recovered a passport and a bank book belonging to him, yet the court was of the view that it was insufficient to trigger the presumption.

[24] The prosecution had tendered the accused's personal belongings (exh. P18, exh. P19, exh. P20, exh. P21, exh. P22 and exh. P23) to trigger the presumption that the accused was the occupier of the room. The prosecution also called SP4, the owner of the house, to give evidence that the said house was rent out to the accused. However, there was nothing to show that other person has no access to the said room. In fact, there was evidence that other people inside the house and visitors can enter and leave the said room freely. As such, the court concluded that the accused had no care and management of the room to trigger the presumption under s. 37(b) of the Act.

Issue (c)

[25] The rule in *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1 requires the prosecution to call all necessary witnesses to unfold the narrative of their case. Concerning the failure on the part of the prosecution to call Samiun bin Mohd Dah and make him available in court, the prosecution submitted that all efforts had been taken to trace him but the attempts are fruitless. Therefore, the prosecution sought that the statement made by this witness under s. 112 CPC be admitted pursuant to the provision under s. 32(1)(i) and (j) of the Evidence Act 1950.

[26] In *Sim Tiew Bee v. Public Prosecutor* [1973] 1 LNS 138; [1973] 2 MLJ 200, the court held that before the court could admit the statement of a witness as evidence under s. 32, the condition precedent contemplated under the section must be satisfied. The prosecution has to satisfy the court that the witness cannot be found or that his attendance cannot be procured without an amount of delay or expense.

[27] In *Public Prosecutor v. Mohamed Kassim bin Yatim* [1976] 1 LNS 105, it was held that the presumption under s. 114(g) of the Evidence Act 1950 would not arise where the prosecution had made sufficient attempts to trace the important witness. In the present case, SP11 had made several attempts to trace Samiun bin Mohd Dah by:

a) tracing the latest address from National Registration Department (exh. P26) and Election Commissions's office. SP11 went to the said address but was told by the tenant that he did not know about Samiun's whereabouts; and

b) through advertisements in Harian Metro, dated 14 July 2007 (exh. P25) and Berita Harian dated 24 November 2007 (exh. P27).

[28] Viewing the evidence on this aspect in the light most favourable to the prosecution and in the absence of objection by the learned defence counsel, this court was satisfied that the condition precedent contemplated under the section has been satisfied. As a result, the statement was admitted and marked as exh. P24. Although exh. P24 was admitted as evidence, a statement made under s. 32(1)(i) and (j) of the Evidence Act 1950 must be examined with the greatest caution especially in this present case where the accused was facing a charge carrying a mandatory sentence of death. The weight or probative value of exh. P24 is very minimal ('minimal weight') in evidence because of these reasons:

a) Exhibit P24 is not subject to cross-examination by the defence;

b) This witness is not an uninterested witness because he was the occupier of the second room in the house where the drugs were found. Furthermore, certain amount of drugs of similar nature were also found in his room and he was charged and convicted for an offence under s. 39A(2) of DDA; and

c) In P24, this witness stated that "saya tidak terlibat dengan dadah". The statement of the witness on this aspect does not inspire confidence bearing in mind the fact that he was charged under s. 39(A)(2) DDA 1952 and was convicted with the offence for the drugs found in the other rooms of the house.

[29] Concerning the weight to be given to exh. P24, this court agreed with the observation made by KC Vohrah J (as he then was) in *Public Prosecutor v. Mohd Jamil bin Yahya & Anor* [1994] 1 CLJ 200 when he said:

> In my view the weight and degree of credit to be attached to a statement by a declarant under paragraph (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.

[30] Based on the above reasons, the failure on the part of the prosecution to call Samiun bin Mohd Dah to give evidence in court created a gap in the prosecution case. In circumstances of the case, Samiun bin Mohd Dah might had access to the room and in possession of the said drugs.

[31] On maximum evaluation of the evidence presented by the prosecution, this court found that the prosecution had failed to prove a *prima facie* case against the accused. In the circumstances, the accused was acquitted and discharged without calling him to enter his defence.